

SPECIAL MEETING OF THE WORKING GROUP  
TO PREPARE THE DRAFT AMERICAN DECLARATION  
ON THE RIGHTS OF INDIGENOUS PEOPLES

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INTERVENTIONS BY  
THE DELEGATION OF CANADA

## Intervention No. 1

*Article XVIII. Traditional forms of property ownership and cultural survival. The rights to land and territories*

Mr. Chairman, the Canadian delegation is pleased to participate in this important meeting on the rights of indigenous peoples and the resumption of discussions on the rights to lands, territories and resources.

We would like to make a few general comments before offering specific comments on Article 18.

While our focus here is on developing and elaborating standards for our hemisphere, we need to be mindful that these standards must be harmonious with and compliment work in other international fora.

The language in this Declaration must be flexible enough to accommodate a variety of historic and current circumstances, and a variety of legal regimes - specifically common-law and civil law regimes. The Declaration must take account of land and resource arrangements that states and indigenous peoples have entered into historically, those negotiated in recent years and new formulations they may enter into in the future. It must reflect that while indigenous land and resource rights may have the highest form of domestic legal protection, as they do in Canada, they are not absolute, and must co-exist with the rights and interests of the State population as a whole. In the balancing of these at times competing interests often, but not always, the interests of indigenous peoples will prevail.

Mr. Chairman, we have quickly reviewed the Report of the Rapporteur (GT/DADIN/doc 113/03 rev 1). The conclusions drawn by the Work Group's Rapporteur form a good basis for our work here. The Rapporteur's report demonstrates that to play this role the current language of the Draft Declaration must be clarified and a common understanding reached about the meaning of terms used; attention must be paid to translation, to ensure that critical terms are understood in the same way by all parties; and differences between common and civil law regimes must be considered and accommodated. In relation to that latter point, while we may share common objectives on what must be achieved the legal methods we use to achieve those objectives may differ according to our legal regimes. The language of the Declaration needs to be clear about the objectives, but also flexible about the means.

We understand that Article 18 is intended to address rights of ownership and use of lands and resources, by indigenous peoples, based on their prior occupancy and continuous use. It is also intended to address their rights and ability to control the use by their community of their lands and resources, in accordance with their traditional forms of ownership and use. Canada supports these objectives.

We will now offer some specific comments on Article 18 of the Chair's proposed text.

We note that in the English text the concept of "continuous possession", referred to by the Work Group's Rapporteur as a basis for indigenous rights, is not clearly reflected. We believe this should be addressed in the final text of the Article, perhaps in Article 18 (2).

Article 18 does not reflect the important principle that while meriting the highest level of protection, indigenous rights, like the rights of others, may not be absolute. Thus reference to terms like "permanent", "imprescriptible", non-transferable" and "indefeasible" are problematic.

In relation to 18(6), Canada supports access by indigenous peoples to all the available remedies under the

domestic legal regime relating to trespass and unauthorized use of their lands. Canada suggests that states should not be required to take measures as required here, but should ensure that adequate legal remedies are available.

Finally, in relation to identification of indigenous lands, there needs to be clarification of the obligation arising from the term “demarcation”. As well, the term “homologation” used by the Rapporteur of the Work Group also is not commonly used or understood in Canada.

**Mr. Chair, we will table our suggested language on lands and resources. Proposed alternative text on Lands and Resources**

Article:

Indigenous peoples have the right to maintain and strengthen their distinctive traditional relationship with the lands and resources they own, occupy or use, and to uphold their responsibilities to future generations in this regard.

Article:

Indigenous peoples have the right to develop, control and use the lands and resources which they own or of which they have exclusive use. This includes recognition of their traditions and customs, land-tenure systems and institutions for the development and management of these lands and resources.

States shall take effective measures to prevent, or provide remedies for, any unauthorized interference with, alienation of or encroachment upon these lands and resources.

Article:

Indigenous peoples have the right to restitution, or fair and just compensation, for the lands and resources which they own or of which they have exclusive use, which may be unlawfully confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation should take the form of lands and resources equal in quality, size and legal status where possible.

States should establish fair and equitable procedures for the resolution of unresolved claims for lands and resources.

Article:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of the lands that they own or of which they have exclusive use.

They have the right to require that States consult with them on at least the same basis as other people, prior to approval of any project affecting these lands and resources. Environmental assessments should take into account the traditional practices of indigenous peoples on lands and resources that may be affected by development.

States should take measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts on the lands and resources that indigenous people own or of which they have exclusive use.

Article:

No arbitrary removal or relocation of indigenous peoples shall take place. Forced removal or relocation shall only take place in accordance with the principles of due process and just compensation, and, where possible, with the option of return.

**Intervention No. 2**

*Article XX. Intellectual property rights*

Canada recognizes the importance of cultural heritage to indigenous peoples. We note the links between this section, as it addresses questions of ownership and control of cultural heritage, and Articles 7 and 10. We suggest that the issue of “intellectual property rights” should be addressed in Article 20, while those matters currently in Article 20 that address cultural heritage, should be addressed in Article 7, building on that provision through additional text. We will address that Right to cultural integrity when we further review Article 7.

In relation to “intellectual property rights” we note that in the years since this Article was first included in the draft declaration a much greater understanding of the issues relating to controlling access to and use of indigenous traditional knowledge, innovations and practices has developed among states. As well, a greater understanding of the possible implications at domestic and international law has developed among indigenous peoples and states. Topics such as bio-piracy, the human genome, genetically modified food and plants, and cloning have become common issues for discussion by indigenous peoples, states and other domestic and international actors.

In other international bodies such as the World Intellectual Property Organization (WIPO), UNESCO, WHO, UNCTAD and the WTO, indigenous peoples and states are considering issues relating to the protection of traditional knowledge, innovations, practices, folklore, tangible and intangible property of indigenous peoples. A WIPO intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore, has met four times with increasing participation of indigenous peoples and it will meet again twice in 2003. The topics under discussion will be those that this Article seeks to address under “intellectual property.” The WIPO secretariat has done excellent work to support the discussions at those meetings.

States and indigenous peoples now understand that the existing intellectual property regime, which protects individual creations for limited periods of time- rather than protecting collective knowledge for unlimited periods of time, adopts an approach that is not consistent with the objectives and approach of many indigenous communities.

The challenge in Article 20 is how to balance individual and collective interests- the interests of the indigenous collectivity, with those of the larger collectivity, and those of the individual creator/artist- indigenous and non-indigenous. Proper understanding of the specifics of the existing intellectual property regime is required to ensure this is done in a fair and effective way.

Canada supports language that recognizes the rights of the individual under the Covenant on Economic, Social and Cultural Rights (Article 15). We recognize that some states may wish to consider special measures to protect the interests of the collective. However, we do not believe there is consensus even among indigenous peoples studying the issue, on what such special measures could be, thus we do not support a prescriptive approach at this time.

Canada supports and will continue to participate in the WIPO process, to further study these issues seeking to develop, with the participation of indigenous peoples, a fair and effective means to address these issues. In this process, states must be mindful of their existing international legal obligations under existing treaty norms.

To that end, we suggest the following language:

**Proposed language**

Article 20:

1) Indigenous individuals have the right to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which she is the author, and are entitled to protection under the law, as other members of the national population.

2) States should take special measures, as appropriate, to facilitate the efforts of indigenous peoples to develop and protect their sciences, technologies and traditional knowledge, and cultural manifestations including their oral traditions, literatures, designs and visual and performing arts, and their knowledge of the properties of flora and fauna, genetic resources, seeds and medicines.

**Intervention No. 3**

*Article XXI. The right to development*

Mr. Chairman, the delegation of Canada believes that the purpose of Article 21 is to address the issue of indigenous peoples identifying and pursuing their economic development. For this reason, we believe the title of the Article should be changed, for example to "Development Opportunities", to distinguish it clearly from the "Right to Development" as that term is used in the United Nations system. If this Working Group decides to address the "right to development" and its possible inclusion in this Declaration, in Canada's view this should be the subject of a full and separate discussion.

Mr. Chair, Canada has considered the original text, and that proposed by the Chair. We find the language proposed by the Chair is an improvement over the original text. However we believe the text can still be improved to better reflect the objectives and intent of the Article. We look forward to hearing the views of those present to help us reach a common understanding about the objectives and preferred language. For that reason, although we have concerns about the breadth of some of the language we are not proposing alternative text at this time.

In our view Paragraph 1 of Article 21 is closely related to the right of self-government addressed in Article 15, and could be included within that Article.

Canada supports the intent of Paragraph 1, reflecting as it does an aspect of the “right of self-government” which Canada supports.

Domestically Canada recognizes the inherent right of self-government of indigenous peoples. Recognition of the inherent right is based on the view that the indigenous peoples of Canada have the right to govern themselves in relation to matters internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their lands and their resources. This includes decisions relating to development as considered in Article 21, paragraph 1. Canada notes that the exercise of the right of self-government must be harmonized with the exercise of jurisdiction by other levels of government within that state. Therefore the exercise of self-government should be accomplished through negotiations between the appropriate level of government and indigenous communities.

Given our understanding of the purpose of paragraph 1, access to state resources as a means of implementation in the context of self-government agreements would be subject to negotiated arrangements.

We suggest that the final concept in paragraph 1, the contribution by indigenous peoples to the national development, could be addressed in a separate paragraph. We understand that the purpose of the paragraph is that indigenous peoples are not to be precluded from participating in the development of the State and we support this objective.

Paragraph 2:

Canada supports the principle that indigenous peoples have the right to participate in decisions regarding any plan, program or proposal which directly affects their rights or living conditions, on at least the same basis as other members of the population.

We note that in yesterday’s discussion, Mr. Littlechild suggested that the issue of consultation between States and indigenous peoples on matters directly affecting indigenous peoples, could be addressed in a separate Article. We think this idea should be considered further.

Paragraph 3:

At this time, we feel the intended scope of paragraph 3 is unclear. The original text and that of the Chair is very broad in their application. We wish to consider it further, and take into account the views expressed by others present here today, and will reserve our position on this paragraph until a later time.

**Intervention No. 4**

*Article XXII. Treaties, acts, agreements and constructive arrangements*

Mr. Chair, the government of Canada strongly supports the position that parties to treaties, agreements and related arrangements should fulfill their obligations. We recognize that rights flowing from treaties between States and indigenous peoples merit a high level of protection, and in fact the existing rights of indigenous peoples flowing from treaties were, in 1982, given constitutional protection. We continue to negotiate treaties the rights of which can be constitutionally protected. The Nisga’a treaty is one of the

best known recent examples of this approach.

We have taken the opportunity to consider the original text, as well as your proposal, in Column 3 for this important Article. We believe that the Chair's text states the appropriate principles more clearly than the original text. We note concern with the use of the term "spirit and intent", as that imposes an interpretive technique over and above the terms that may be agreed to by the parties. Should "spirit and intent" be an agreed approach, it can be used by the parties; should a dispute result in litigation, domestic courts can determine if that is the appropriate interpretive technique.

We also wish to table language we tabled for the UN draft declaration, noting the need for harmony between the documents. We suggest that:

Indigenous peoples have the right to the recognition and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, and to have States honour and respect such treaties, agreements and arrangements. Conflicts and disputes that cannot otherwise be settled may be submitted to competent domestic bodies.

Alternatively:

Legal obligations arising from treaties, agreements and other constructive arrangements concluded by states with indigenous peoples shall be recognized, observed and enforceable. Recourse shall be to competent domestic bodies for the resolution of conflicts and disputes that cannot otherwise be settled.

We note our understanding that neither formulation would preclude indigenous peoples or individuals from exercising existing or future rights of recourse to competent international tribunals.

### **Intervention No. 5**

*Articles XXIII through XXVII.*

Mr. Chair, in relation to Articles 23 to 28, Canada believes that these will have to be reviewed and finalized when the operative provisions of the Declaration have been agreed upon. However, we will take this opportunity to provide some brief comments on a few of these provisions:

We agree with the Chair's reformulation of Article 23 to refer to indigenous peoples and individuals. Proposed Article 24 also could be improved by referring to both indigenous peoples and individuals.

We are willing to give further consideration to the language proposed by the Chair for new Articles 27 and 28.

From a Canadian perspective we could agree with language along the lines proposed by the Chair and which might also incorporate the following additional elements:

"...flexible and progressive nature of implementation, taking into account the particular jurisdictional and constitutional natures of States."

In the proposed Article 28, the reference to “measures that must be taken to comply”, is potentially ambiguous, suggesting that specific measures are required to implement the Declaration, which is language more common in a Convention. This may be a translation issue, or again a question of different legal approaches. Alternative wording which we would be willing to consider is:

“Measures taken to implement the Declaration shall be determined on a flexible basis, taking the particular conditions of each country into account.”

### **Intervention No. 6**

#### *SECTION TWO. HUMAN RIGHTS*

Mr. Chair, it is the view of the Canadian delegation that Section Two is a critical section in this declaration; it is critical both because of what it addresses, human rights and fundamental freedoms, and because of what it currently omits. In relation to what it omits, I remind you that last year Canada explained our position on the right of self-determination as it applies to indigenous peoples living within democratic states that represent the whole people without discrimination. We suggested that language on self-determination be included in the text of the declaration. We distributed a paper outlining our position on self-determination, and we refer representatives of indigenous peoples and states to that paper. We look forward to a full discussion of this issue in the future.

In considering Section Two, as suggested we recommend strengthening it through the addition of a general provision on children. We have suggested such a clause on children in the discussions of the UN Draft Declaration, and we believe similar language in an OAS declaration would strengthen the declaration in a very important area. Possible language would be:

States shall respect and ensure the rights and freedoms and special protections set forth in international law to each indigenous child in their jurisdiction and take into account the indigenous heritage of the child.

In considering Section Two, it is the view of the Canadian delegation, that this Section must be carefully drafted, keeping in mind the existing international rights and freedoms available to indigenous peoples and individuals. Should we wish to create new rights the language must be clear and unambiguous so that the content of the right is clear, and the consequent obligation is well understood. From the Canadian perspective, where we are reflecting existing rights and freedoms, to the greatest extent possible we should ensure that we use commonly accepted existing formulations, reflecting the universal nature of human rights and fundamental freedoms. This is the approach we will be using when we propose alternative text.

Mr. Chair, rights such as the right of self-government also provide a means for the exercise of the right of the collective. Negotiated self-government agreements can facilitate a harmonious relationship between an indigenous government and State governments through negotiated arrangements addressing issues such as jurisdictions, authorities, and the relationship of laws.

Finally, we must ensure that the Declaration is not limited by an enumeration of instruments, perhaps to the exclusion of future instruments.



## **Article 2. Full observance of human rights**

### Article 2, Paragraph 1

We suggest that Article 2 paragraph 1, should be reformulated to reflect existing language on the ability to enjoy human rights and fundamental freedoms. At present there is no “right to enjoy all rights” in international human rights law. Rather individuals and collectives have human rights, and should be free to enjoy them. We refer to the UDHR, Article 2. We recommend further that Article 2 paragraph 1 should address the rights of indigenous peoples and individuals.

We suggest deleting the reference to “the instruments of” international law as this may limit rights that arise in customary international law.

Finally, the provision should not enumerate instruments, but should refer to all rights.

For Article 2, paragraph 1, we suggest language such as the following:

1. Indigenous peoples and individuals are entitled to the full and effective enjoyment of all human rights and fundamental freedoms without distinction of any kind. Nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with international law, including human rights law.

### Article 2, Paragraph 2

In relation to Article 2 paragraph 2, we suggest greater clarity is required if the text is to provide the guidance states and indigenous peoples will be seeking on the rights and obligations that are recognized in this instrument. For example, the reference to “collective rights that are indispensable to the enjoyment of the individual human rights of their members” is unclear as to its intent and unfamiliar in its formulation. We note again that Canada has suggested inclusion of recognition to the right of self-determination expressly in the Declaration; perhaps this approach would mean that this reference to “collective rights essential to individual rights” would be unnecessary.

## **Article 3. Right to belong to indigenous peoples**

Mr. Chair, in relation to Article 3 we note that there is no “right to belong” in international human rights law. Rather this is an aspect of the right to freely associate, and this should be reflected in the text. Furthermore, the purpose of this paragraph arguably is to address the ability of a collectivity to determine membership, in accordance with customs and traditions. To ensure flexibility for indigenous peoples, we suggest that the reference to “in accordance with traditions and customs” be modified to ensure that the can freely choose to change their customs and traditions relating to membership.

We note the Chair’s text calls for states to ensure respect for the individual or collective right to identify oneself as indigenous in accordance with the institutions of each indigenous peoples.

We suggest that the role of the state is to ensure that no discrimination is suffered by virtue of an individual identifying himself, or a people identifying itself as indigenous, rather than seeking to ensure respect for the right to self-identify. As worded it is unclear whether the state is expected to have a role in disputes within an indigenous people about who is indigenous. We would discourage this approach. In

our view, the role of the state is to ensure freedom to associate, to ensure no discrimination results from identifying as indigenous, and to require indigenous collectives respect human rights standards.

We recommend a formulation such as the following:

**Article 3. Right to determine membership and identify as indigenous**

**Indigenous peoples may determine their membership in accordance with the traditions and customs of the community concerned, if they so choose. Indigenous individuals shall not be denied membership in an indigenous community except in accordance with due process of law. This is without prejudice to the right of an individual to a nationality.**

**Article 4. Legal status of communities**

Mr. Chair, the language of Article 4 unclear, and the precedents that are cited unfortunately do not provide us with a definitive understanding of the intended purpose, as they address individual rights, and membership issues. Canada can support this Article if the purpose is to enable the indigenous collective to be recognized as a legal entity in the domestic legal system, with the associated rights of a natural person, that is the right to contract, to sue and be sued etc. However this could be more clearly expressed, and we suggest text such as the following:

**Indigenous peoples have the right to a “legal personality” recognized within the state legal system.**

**Article 5. No forced assimilation**

Canada supports the objective of this important provision, which we recognize as essential to the continued survival of indigenous peoples.

Canada could consider text such as the following:

**Indigenous peoples and individuals have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to practice and revitalize their cultural traditions and customs.**

**States shall not take or permit measures aimed at depriving indigenous individuals or peoples of their cultural values or ethnic identities through their denigration, or their forced assimilation.**

Canada had suggested the following text on genocide in April, 2001:

Indigenous peoples have the right not to be subject to any action of genocide as defined at international law.

**Article 6. Special guarantees against discrimination**

Canada proposed the following text in April 2001:

**Indigenous peoples have the right to protection from discrimination. States are encouraged to take special measures against discrimination as may be required for full enjoyment of international and nationally recognized human rights and to take any measures to enable indigenous women, men and children to exercise their civil, political, economic, social, cultural and spiritual rights.**